

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

PHILIP HUBER,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

) Case No. SUSP-04-0010

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 Hearing. This appeal came on for hearing before the Personnel Appeals Board, BUSSE NUTLEY, Vice Chair, and, GERALD L. MORGEN, Member. The hearing was held at the office of the Personnel Appeals Board in Olympia, Washington, on December 9, 2004.

1.2 Appearances. Appellant Philip Huber was present and was represented by Gregory Rhodes, Attorney at Law, of Parr, Younglove, Lyman & Coker, P.L.L.C. Emily Caulkins, Assistant Attorney General, represented Respondent Employment Security Department.

1.3 Nature of Appeal. This is an appeal from a disciplinary sanction of a three-day suspension for neglect of duty, inefficiency and willful violation of agency policies. Respondent alleges Appellant misused state resources and engaged in inappropriate behavior with a client.

II. FINDINGS OF FACT

2.1 Appellant is a permanent employee for Respondent Employment Security Department. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on March 2, 2004.

2.2 Appellant began his employment with ESD on January 7, 2002. Appellant has no previous disciplines of any type. As an Unemployment Insurance (UI) Specialist 4 at the King County TeleCenter, Appellant adjudicates determinations or re-determinations to grant or deny unemployment insurance benefits to claimants. Appellant's duties include conducting fact-finding interviews, primarily over the telephone, with claimants, employers, employer representatives and third parties.

2.3 By letter dated February 25, 2004, Cynthia Harris, Acting Assistant Commissioner of the Administrative Services Division, notified Appellant that she was suspending him for three days, effective March 1 through March 3, 2004. Ms. Harris charged Appellant with neglect of duty, inefficiency, and willful violation of the following agency policies: No. 0014, Inappropriate Sexual Behavior and Sexual Harassment, No. 1016, Employee Conduct, No. 2009, Use of Agency Telecommunications Technology Systems, and No. 2016, Use of Department Telecommunications Technology Resources. Specifically, Ms. Harris alleged Appellant misused state resources and engaged in inappropriate behavior with client D.L. in the course of adjudicating her unemployment insurance claim.

2.4 The events leading to Appellant's suspension began when D.L. filed an unemployment insurance claim with the department. D.L.'s claim was assigned to Appellant and on July 29, 2003,

1 Appellant contacted claimant D.L. by telephone to schedule an in-person interview with her. The
2 conversation between Appellant and D.L. turned from the topic of D.L.'s claim to non-work,
3 personal issues and lasted approximately one and one half hours. During the conversation, D.L.
4 broached a non-work related topic and Appellant admits that when D.L. asked him questions of a
5 personal nature, he would supply her with answers.

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7 2.5 On August 4, 2003, Appellant spoke with D.L. by telephone to discuss her separation from
8 employment. These conversations also diverged from business discussions to discussions related to
9 D.L.'s personal issues. Appellant admits he shared personal information about himself with D.L.
10 This conversation lasted approximately one and one half-hours.

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12 2.6 On August 5, 2003, Appellant contacted D.L. regarding information her employer provided
13 to the department related to her claim. This conversation lasted approximately one and one half
14 hours during which D.L. and Appellant engaged in personal discussion.

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16 2.7 On August 6, 2003, Appellant returned a phone call to D.L. regarding a self-employment
17 questionnaire he mailed her. The nature of the conversation again diverged from business to a
18 mutual discussion of a personal nature. Appellant admits he asked D.L. to fax him a written request
19 for a copy of the statement from her employer and to spell his name as "Fil." When D.L. asked
20 about the nickname, Appellant explained to her that "Fil" was a college nickname that was short for
21 "filthy Fil" and that he was "kind of wild" in college. D.L. discussed her psychic abilities and
22 offered Appellant a psychic reading. In response, Appellant asked D.L. if she could "psychically"
23 see what he was doing with his hands and D.L. asked if he was "touching" himself.

24
25 2.8 On August 11, 2003, Appellant placed a call to D.L. to discuss her claim. During their
26 conversation, D.L. insisted that Appellant looked up a website to verify her employment as well as

1 see her picture. Appellant and D.L. also discussed a voicemail of recorded music that Appellant
2 received at work one evening. D.L. told Appellant she left him the message and Appellant told her
3 that he liked it and saved it.

4
5 2.9 On August 14, 2003, ESD received a complaint through the Governor's Office from D.L.
6 alleging Appellant engaged in sexually harassing behavior toward her during the course of
7 managing her claim. D.L.'s complaint was transferred to the Commissioner's office at ESD. Sheila
8 Johnson Teeter, administrative assistant took the call. D.L. described to Ms. Teeter Johnson her
9 interactions with an ESD employee named Phil. D.L. stated that Appellant told her his nickname
10 was "Fil" for "filthy," they discussed her website, that Appellant looked up and saw her photo, and
11 that Appellant told her she had a good claim. D.L. also claimed Appellant told her he was unhappy
12 and unfulfilled and hinted at a relationship with her, asked to meet her at a park, described himself
13 as 6'6", and that he resembled Dennis Weaver. D.L. expressed fear because she believed Appellant
14 could influence the decision on her claim. Ms. Teeter Johnson's conversation with D.L. was
15 lengthy, and she described D.L. as "rambling," with D.L. sharing personal information about
16 herself.

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18 2.10 Following receipt of the complaint, the agency conducted an investigation. Diversity
19 Manager Kintu Nnambi interviewed Appellant and D.L. Mr. Nnambi's written report found that
20 Appellant engaged in lengthy telephone conversations with D.L. that included discussions of a
21 personal nature by both D.L. and Appellant. Mr. Nnambi determined that Appellant spent more
22 time than necessary looking up D.L.'s website in order to verify claimant information, that
23 Appellant asked the client to address documents to him using his nickname, Fil, and engaged in an
24 inappropriate conversation when he asked D.L. if she could see "psychically" what he was doing
25 with his hands. Mr. Nnambi's investigation did not find evidence to support that Appellant became
26 emotionally involved with D.L. or asked her to meet him.

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2 2.11 Cynthia Harris, Assistant Commissioner for Insurance Services, was Appellant's appointing
3 authority when the discipline was imposed. After reviewing Mr. Nnambi's investigative findings
4 and Appellant's response to D.L.'s allegations, Ms. Harris concluded that although the investigation
5 did not support all of D.L.'s allegations, Appellant's own admissions supported that his conduct
6 with D.L. was unusual and unprofessional. Ms. Harris found the length of time Appellant spent on
7 the phone with D.L., as well as the nature of their discussions, was highly inappropriate. Ms. Harris
8 acknowledged that it was appropriate for an employee and a client to engage in some courteous and
9 personal conversation during an interview; however, she concluded Appellant's conversations with
10 D.L. went beyond the range of reasonableness. Ms. Harris concluded Appellant was extremely
11 inefficient in his use of state time, his conduct with the client was totally out of compliance with the
12 agency's responsibilities and that he violated agency policies.

13
14 2.12 In determining the level of discipline, Ms. Harris considered Appellant's length of service,
15 his employment record, and his responses to the allegations. Ms. Harris was concerned with
16 Appellant's failure to contact his supervisor and report the client's behavior since he kept insisting
17 she was a difficult client and hard to manage. Ms. Harris concluded a three-day suspension was
18 appropriate because Appellant should have known he was acting in an inappropriate manner.

20 **III. ARGUMENTS OF THE PARTIES**

21 3.1 Respondent argues Appellant misused state resources by talking to a client about personal
22 issues and inappropriate topics. Respondent asserts the duration of the calls was excessive and
23 much longer than necessary to resolve the client's claim. Respondent argues that Appellant was
24 provided with the agency's policies regarding misuse of resources and appropriate behavior with
25 clients. Respondent argues that the department cannot tolerate employees engaging in inappropriate
26

1 behavior with clients and that Appellant neglected his duties as an adjudicator, failed to use
2 resources properly, was inefficient in his use of state time and willfully violated agency policies.

3
4 3.2 Appellant denies that his conversations with D.L. were inappropriate and he contends D.L.
5 took the truth and twisted it into lies. Appellant asserts D.L. was a difficult client to control and that
6 he could not control their conversations without being rude to her. Appellant contends he did his
7 best to redirect their conversations and remain polite to avoid violating the agency's customer
8 service tenets. Appellant asserts he did not seek the assistance of his supervisor because he believed
9 the situation with D.L. was under control. Appellant asserts that during his conversations with
10 D.L., he used his time as efficiently as possible by working on his computer. Appellant also claims
11 his use of the internet to verify information provided by D.L. was appropriate.

12 13 IV. CONCLUSIONS OF LAW

14 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.
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16 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
17 the charges upon which the action was initiated by proving by a preponderance of the credible
18 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
19 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
20 Corrections, PAB No. D82-084 (1983).

21
22 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
23 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
24 of Social & Health Services, PAB No. D86-119 (1987).

1 4.4 Inefficiency is the utilization of time and resources in an unproductive manner, the
2 ineffective use of time and resources, the wasteful use of time, energy, or materials, or the lack of
3 effective operations as measured by a comparison of production with use of resources, using some
4 objective criteria. Anane v. Human Rights Commission, PAB No. D94-022 (1995), *appeal*
5 *dismissed*, 95-2-04019-2 (Thurston Co. Super. Ct. Jan. 10, 1997).

6
7 4.5 Willful violation of published employing agency or institution or Personnel Resources
8 Board rules or regulations is established by facts showing the existence and publication of the rules
9 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
10 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

11
12 4.6 Respondent has proven by a preponderance of the credible evidence that the time Appellant
13 spent on the phone with D.L. was unreasonable and outside the scope of proper use of work time.
14 The appointing authority testified that some sharing of personal information with clients is
15 acceptable. However, in this case the amount and degree of information Appellant shared with D.L.
16 was excessive and inappropriate. We recognize that D.L. was a difficult client; however, Appellant
17 was an experienced UI Specialist 4 and should have known to notify his supervisor and ask for
18 assistance once it was clear that his attempts to redirect D.L. failed. Furthermore, encouraging D.L.
19 to use his nickname was inappropriate and unprofessional. Appellant's actions constitute a neglect
20 of duty, inefficient use of work time, and a violation of Policy 1016 regarding appropriate employee
21 behavior.

22
23 4.7 Respondent charged Appellant with violation of agency Policy No. 0014, Inappropriate
24 Sexual Behavior and Sexual Harassment. However, Respondent presented no evidence that
25 Appellant engaged in any inappropriate behavior of a sexual nature. Further, Respondent has failed
26 to prove that Appellant misused state resources when he used the internet to verify information

1 related to D.L.'s claim. Therefore, Respondent failed to meet its burden of proving Appellant
2 violated Policies 2009 and 1016.

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4 Under the facts and circumstances, we conclude that a three-day suspension is too severe.
5 Therefore, the disciplinary sanction should be modified to a one-day suspension.

6
7 **V. ORDER**

8 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Philip Huber is modified from
9 a three-day suspension to a one-day suspension.

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11 DATED this _____ day of _____, 2005.

12
13 WASHINGTON STATE PERSONNEL APPEALS BOARD

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16 _____
Busse Nutley, Vice Chair

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18 _____
Gerald L. Morgen, Member